

CIRILO B. SANTOS, PLAINTIFF AND APPELLANT, VS. CECILIO RIVERA, DEFENDANT AND APPELLEE.

G.R. No. 10050. December 24, 1915

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal from a judgment of the Court of First Instance, sustaining the demurrer to the amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action, followed by an order dismissing the cause, after having given the plaintiff an opportunity to again amend his complaint.

The plaintiff seeks to compel the defendant to specifically perform a contract for the sale of certain described real estate and to pay the sum of P4,487 as damages, this sum being the difference between the price of 12,820 cavanes of patay which the plaintiff was compelled to sell on April 5, 1913, in order to obtain funds to pay for the realty which he agreed to buy and which the defendant agreed to sell, and the price which the palay would have brought in July of that year.

The complaint shows that the contract relied upon is an oral one which falls within the Statute of Frauds. (Sec. 335 of Act No. 190.) No sufficient grounds were alleged to take the case out of the statute of frauds, if this could be done under section 335.

The statute of frauds does not make an oral contract within its terms illegal, but merely voidable at the election of the party sought to be charged. Such election, however, must be manifested in some affirmative way. (Conlu vs. Araneta and Guanko, 15 Phil. Rep., 387; Gallemit vs. Tabiliran, 20 Phil. Rep., 241; Gomez vs. Salcedo, 26 Phil. Rep., 485.) The defendant has expressly manifested by his demurrer that he does not wish to be bound by the oral contract to sell the realty in question. Under the allegations in the complaint, the defendant is well within his rights in doing so. He may set up the defense of the statute of frauds by demurrer, when the complaint shows on its face that the contract relied upon is an oral one and that there are no allegations which take the case out of the statute. (Gomez vs. Salcedo, *supra*.)

Now, may the plaintiff establish the oral contract for the purpose of recovering damages for its breach when he is not permitted to establish the contract for the purpose of specific performance? According to the allegations in the complaint, which are, at this stage of the proceedings, accepted as true, the defendant led the plaintiff to believe, by his oral statements, that the contract for the sale of the realty would be consummated and the corresponding documents executed. Believing that the defendant would carry out his oral contract, the plaintiff sold his palay at a reduced price in order to get sufficient funds to pay for the realty. After the palay had been thus sold and the plaintiff had obtained the required amount, he went to the house of the defendant with a notary public and requested the execution of the deed, at the same time tendering the amount of the purchase price. Nothing else was done by either party. The defendant declined to go further with the matter.

The promise, upon which the statute of frauds declares that no action can be maintained, cannot be made effectual either in law or in equity merely because it has been acted upon by the promisee and not acted upon by the

promisor.

The judgment appealed from is hereby affirmed, with costs against the appellant. So ordered.

Arellano, C.J., Torres, Carson, and Araullo, JJ., concur.

Judgment affirmed.

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